93-681

No. _____

Supreme Court, U.S.
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In The

Supreme Court Of The United States

October Term, 1993

PAUL R. VITARELLI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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October 29, 1993

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QUESTION PRESENTED

(1) Whether the United States District Court's failure to exclude opinion evidence offered by FBI Agents strongly suggesting the petitioner's guilt of crimes charged constitutes reversible error?

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LIST OF PARTIES

The parties to the proceeding below were the Petitioner, Paul R. Vitarelli, Joseph J. Santopietro, Perry A. Piscotti, Robert A. Giacomi, Jack R. Giacomi, Fred L. Giusti and Thomas E. Porzio.

The Respondent before this Court includes solely the United States of America.

No._____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

PAUL R. VITARELLI, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

The petitioner, Paul R. Vitarelli, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 996 F.2d 17, and is reprinted in the appendix hereto, p. 1a-21a, infra.

JURISDICTION

The judgment and opinion of the Court of Appeals in this matter was entered on June 9, 1993. On July 29, 1993, a timely petition for rehearing filed by co-defendants, Joseph J. Santopietro and Perry A. Piscotti, and adopted by the petitioner, was denied by the Court of Appeals. App. B, infra, 22a-28a. The appeal is being docketed in this Court within ninety days from the denial of the petition for rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

FEDERAL RULE INVOLVED

Rule 702 of the Federal Rules of Evidence provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

STATEMENT OF THE CASE

A. Procedural History

The United States District Court for the District of Connecticut had jurisdiction pursuant to Title 18, U.S.C. §3231.

On September 24, 1991, the petitioner, President of the Board of Aldermen for the City of Waterbury, Connecticut was indicted by a grand jury and charged with conspiracy, in violation of 18 U.S.C., §371; three counts of bribery in violation of 18 U.S.C., §666; and, making a false statement on a tax return filed

with the Internal Revenue Service in violation of 26 U.S.C., §7206(1). Jury trial of this defendant and six other defendants, including the Mayor of the city, Joseph J. Santopietro, began on February 25, 1992, and concluded with the jury returning guilty verdicts against this petitioner on one count of bribery, the I.R.S. count, and the conspiracy count on April 2, 1992. On June 5, 1992, the petitioner was sentenced to the custody of the Attorney General for a term of 41 months. A timely notice of appeal was filed on June 11, 1992. On June 9, 1993, the Court of Appeals for the Second Circuit affirmed the petitioner's conviction. On July 29, 1993, a petition for rehearing with suggestion for rehearing en banc was denied.

The petitioner and the co-defendants were prosecuted for political corruption. Petitioner was the President of the Board of Aldermen in the City of Waterbury, Connecticut. He was indicted, along with the Mayor of the city, Joseph J. Santopietro, and other political figures. The essence of the government's case rested upon a conspiracy charge alleging that Mayor Santopietro and defendant Perry A. Piscotti, after the election of Santopietro, entered into an agreement with various bank officials who became government witnesses during the prosecution of the case. The agreement provided that the Mayor and his assistant, Piscotti, would be compensated by the bank in the form of loans and cash payoffs disguised in the form of real estate transactions involving nominees and other artifices. In return, the Mayor and Piscotti

allegedly promised to exercise their influence over various political matters concerning land held by the officials at the bank to obtain favorable zone changes and subdivision approvals. According to the government, the agreement, originally hatched in 1986, expanded in 1988 to include the petitioner and others. The petitioner presided over the Board of Aldermen meetings as President and heard matters involving the bank officials and their properties. Besides the charge of conspiracy, the petitioner was indicted for three counts of bribery in violation of 18 U.S.C. §666. The only bribery transaction that the petitioner was convicted of was known as "PVG." The denomination PVG during the trial characterized a real estate transaction, wherein the petitioner received the sum

of $12,000 from a real estate closing paid by defendant Piscotti after Piscotti, inter alia, sold an option he held on a parcel of real estate for a substantial gain. The proceeds from the transaction via financing were provided by the bank headed up by the aforementioned officials. The government alleged that this payment to the petitioner violated 18 U.S.C. §666 and the petitioner was convicted on this count.

At trial, during the cross examination of F.B.I. Agent Clark, he offered his opinion on various transactions specified in the indictment involving defendant Santopietro, other indictees, and the petitioner, Vitarelli. He testified as follows:

> Q: Now, you don't like any of these transactions. That's been your testimony, correct?
>
> A: I feel that there's bank fraud, money laundering, and corrupt payment in several of these

transactions.

2/28/92 Tr. at 145.

Counsel for defendant Santopietro promptly objected and moved to strike Agent Clark's answer. In light of limiting instruction given by the trial court, this portion of the testimony is not challenged. It is only offered for context.

The devastating impact of the agent's opinion testimony came out on redirect where the balancing effect of the trial court's limiting instruction was entirely diluted by the following testimony, given over defense objection:

> Q: Now, at some point in your cross-examination, Mr. Clark, you referred to the term money laundering. Would you tell the ladies and the gentlemen of the jury what you meant by the term, money laundering?
>
> MR. HUGH KEEFE: I object, Your Honor. This is something that Your Honor will instruct the jury on.

THE COURT: Oh, I will probably, but I think he can describe what he means by it.

A: Okay. A money launder or money laundering would be where monies obtained through some type of illegal activity and that same money is -- financial transaction takes place, and the purpose of that transaction is either to disguise either where the money came from or where the money ends up.

Q: And is that also known colloquially as washing the money?

A: Yes.

Q: Now, you also referred, Mr. Clark, to the term corrupt payments. Do you recall that?

A: Yes.

Q: Is that a shorthand or something?

A: It is a shorthand for anything of value.

Q: And where was the term derived from, that is, where did it come from?

A: It comes from the statute which is Title 18, U.S. Code 666.

3/3/92 Tr. at 12. (Emphasis supplied)

The effect of this opinion testimony upon the jury was immense and ultimately led to the conviction of the petitioner.

Further manifestly prejudicial to the petitioner was the Court's allowance of opinion testimony on whether the petitioner's filing of an amended tax return could serve as a defense to the charge of subscribing to a false tax return in violation of 28 U.S.C. §7206(1). The charge arose from the petitioner's failure to report proceeds from a real estate transaction known as Hitchcock Court on his 1988 I.R.S. return. The petitioner filed an amended return in June of 1991. During the cross-examination of F.B.I. agent Mancinone, the following testimony was elicited:

> Q: Now, there's been some testimony and identification of various amended income tax returns, Mr. Mancinone.

A: Yes.

Q: The defendants who are charged with income tax violations arising from the Hitchcock Court transaction are who?

A: Jeffrey Santopietro, Robert Giacomi, Jack Giacomi, Paul Vitarelli.

Q: And what is the alleged violation with which they are charged?

MR. FAZZANO: Objection.

THE COURT: Overruled.

A: Subscribing to a false tax return.

BY MS. FITZSIMMONS:

Q: And to the best of your knowledge, Mr. Mancinone, is the filing of an amended tax return a defense to a charge of subscribing to a false tax return?

MR. HUGH KEEFE: Objection.

MR. CRAMER: Objection.

MR. JOSEPH FAZZANO: Objection.

THE COURT: Objections overruled.

A: No.

2/26/92 Tr. at 124.

The failure of the Court to exclude the opinion testimony of government FBI witnesses constituted prejudicial error. The petitioner's application for certiorari rests upon these evidentiary questions.

REASONS FOR GRANTING THE PETITION

I. THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

In the petitioner's appeal to the United States Court of Appeals for the Second Circuit, he raised the opinion testimony issue as did defendants Piscotti and Santopietro who are also filing a petition for certiorari. The Court, however, (Pratt, Jacobs and Knapp) failed to address their claims in its opinion. App. A, infra 1a-21a. As a result, the Court sanctioned the

District Court's admission of the opinion testimony. At the time of the elicitation of the testimony, the jurors were told by the FBI agents that: a) money received by the petitioner was laundered and its receipt fell within the net of 18 U.S.C. §666; and, b) that the filing of an amended tax return was not a defense to 28 U.S.C. §7206. The agents testimony, in the form of an opinion, strongly conveyed an impression to the jury that the petitioner was guilty. The agent, in classifying the payment to the petitioner as laundered money, so buttressed the claims of the government that the prejudice and spectre of guilt aroused by the testimony cemented the convictions of the petitioner. The government will not and cannot claim that the structure of the PVG real estate venture that the petitioner involved himself in was

illegal. Therefore, the weight of the opinion testimony in the area of laundered money was crushing. Moreover, on the IRS charge, the testimony of the agent instructed the jury that the filing of an amended tax return was not a defense. His testimony directly conveyed an opinion as to the petitioner's guilt, and guided the jury on what verdict to return.

The petitioner does not take the position that all expert opinion testimony from a law enforcement agent is per se inadmissible. It is clear that the various circuits of this nation permit opinion testimony from law enforcement officers in complex cases for specialized reasons: 1) to aid the trier of fact; and, 2) to inform the jury of the components of a subject matter outside of their normal ken. See, United States v. Anguilo, et al., 897

F.2d 1169, 1189 (1st Cir. 1990) testimony of FBI agent on structure of organized crime family admissible; Perkins v. Volkswagen of America, 596 F.2d 681, 682 (5th Cir. 1979) testimony of specialist in mechanical engineering admissible; United States v. Rollins, et al.,862 F.2d 1282, 1291-1292 (7th Cir. 1991) testimony of FBI agent on narcotic code words admissible; United States v. Cerone, et al., 830 F.2d 938, 951 (8th Cir. 1987) testimony of FBI agent on the use of code names in prosecution under 18 U.S.C. §371, 1952, admissible; United States v. Christophe, 833 F.2d 1296, 1300 (9th Cir. 1987) testimony of FBI agent as expert on fingerprints admissible; United States v. Taren-Palma, 997 F.2d 525, 531 (9th Cir. 1993) testimony of police officer translating spanish conversation to english admissible; United States v.

Pinelli, 890 F.2d 1461, 1467-1468 (10th Cir. 1989) testimony of FBI agent on rules of participants in gambling operation admissible; United States v. Harris, 903 F.2d 770, 775-776 (10th Cir. 1990) testimony of FBI agent on interpreting records as "drug records" admissible; United States v. Cross, et al., 928 F.2d 1030, 1049 (11th Cir. 1991) testimony of FBI agent Lanning that photos in pedophile case were obscene admissible.

The holdings of the above cases - expert opinion testimony is admissible in complex cases dealing with complicated subject matter outside the normal ken of an average juror - has been followed by the Second Circuit. See, United States v. Gotti, et al. Nos. 92-1382, 92-1384, 92-1671, 93-1181 (2d Cir. filed Oct. 8, 1993) testimony of FBI agent on nature and function of

organized crime families, imparting structure of such families and disclosing rules of La Cosa Nostra admissible; United States v. Ruggiero, et al., 928 F.2d 1287, 1304 (2d Cir, 1990) testimony of FBI agent interpreting words used by organized crime members admissible; United States v. Brown, 776 F.2d 397 (2d Cir. 1985) cert. denied, 475 U.S. 1141, 100 S.Ct. 1793, 90 L.Ed. 2d 339 400-402 (1986) police officer permitted to describe a typical drug buy in Harlem, where the accused's defense was that he was on the scene but unaware of any drug transaction.

The case at bar, however, does not come within the parameters of the above cases where certain forms of opinion testimony were allowed. Moreover, a vein of discernable case law in the second circuit completely supports the

petitioner's argument that the admission of the agents' opinion testimony was manifestly erroneous. The failure of the United States Court of Appeals for this circuit to even address the following cases as applied to the instant petition constitutes such an unusual departure from the usual course of judicial proceedings to warrant this Court's exercise of certiorari.

In United States v. Scop, 846 F.2d 135 (2d Cir. 1988), the Court reversed 13 mail fraud and security fraud convictions because the trial court had permitted an expert witness to testify to his opinion that:

> ... stock of European Auto Classics was manipulated and that certain individuals were active participants and material participants in the manipulation of that stock. And that these individuals engaged in a manipulative and fraudulent scheme in furtherance of that manipulation.

846 F.2d at 138.

The United States Court of Appeals for the Second Circuit reversed on the basis of this testimony reasoning:

> Had Whitten merely testified that control buying and selling of the kind alleged here can create artificial price levels toward outside investors, no sustainable objection could have been made. Instead, however, Whitten made no attempt to couch the opinion testimony at issue and even conclusory factual statement but drew on the lines of the statute and accompanying regulations concerning "manipulation" and "fraudulent" ... In essence, his opinions were legal conclusions that were highly prejudicial and went well beyond his province as an expert in securities trading. Moreover, because his opinions were calculated to "invade the province of the Court to determine the applicable law and to instruct the jury as to that law," ... they could not have been helpful to the jury in carrying out its legitimate functions. "The admission of such testimony would give the appearance that the court was shifting to the witnesses' responsibility to decide the case."

846 F.2d at 140.

In Hygh v. Jacobs, 961 F.2d 359 (2d Cir. 1992), the court found error in the District Court's decision to admit an

expert witness in a police brutality case to express his opinion, inter alia, that the defendant police officer's conduct was not "justified under the circumstances, ... and totally improper." 961 F.2d at 364. The court stated:

> This Circuit is in accord with other circuits in requiring exclusion of expert testimony that expresses a legal conclusion ... Even if the jury were not misled into adopting outright a legal conclusion proffered by an expert witness, the testimony would remain objectionable by communicating a legal standard - explicit or implicit - to the jury ... whereas an expert may be uniquely qualified by experience to assist the trier of fact, he is not qualified to compete with the judge in the function of instructing a jury.

961 F.2d at 363-64.

Buttressing Scop and Hygh, is the case of United States v. Cruz, 981 F.2d 659 (2d Cir. 1992). In Cruz, the court reversed a narcotics conviction where the government had used expert testimony to bolster a cooperating witness'

testimony. Specifically, in Cruz, the government's expert, Morano, had testified about the manner in which narcotics transactions were conducted in the Washington Heights area of Manhattan. This testimony paralleled the testimony of a government informer, LaBoy, about the particular transactions at issue in this case. In reversing the conviction, the court stated:

> [A]lthough such expert testimony logically adds nothing to the believeability if a witness's account (again absent a suggestion of implausibility), it strongly suggests to the jury that a law enforcement specialist ... believes the government's witness [t]o be credible, and the defendant to be guilty, suggestions we have previously condemned. See United States v. Scop, 846 F.2d 135, 139-43 (2d Cir. 1988).

In Andrews v. Metro North Commuter R. Co., 882 F.2d 705 (2d Cir. 1989), the U.S. Court of Appeals for the Second Circuit vacated the judgment in favor of

the plaintiff ruling that a forensic engineer should not have been permitted to testify as an expert on behalf of a pedestrian that a train platform was slippery and that the pedestrian's conduct in walking along the railroad tracks was reasonable; in addition, the Court held that the forensic engineer should not have been permitted to state the railroad was negligent.

882 F.2d at 708-710.

In Andrews the Court stated as follows:

> [A]lthough the admission of expert testimony is ordinarily committed to sound discretion of the District Court, the exercise of such discretion is not without its limits ... such limits were exceeded in the instant case.

882 F.2d at 710.

Case law from other Appellate Circuits supports the contention of the petitioner that opinion testimony citing a legal conclusion invading the province

of the jury should be excluded. In United States v. Benson, 941 F.2d 598 (7th Cir. 1991), convictions for willfully failing to file income tax returns in violation of 26 U.S.C. §7203, tax evasion in violation of 26 U.S.C. §7201, were reversed. Here, the defendant failed to file tax returns for the years 1980 and 1981 regarding proceeds he was paid by an insurance company in the capacity as an investigator. The defendant was also fraudulently collecting social security disability benefits while working. At trial, the government utilized the services of an IRS agent named Cantzler. His purpose was to summarize the government's trial evidence and give his expert opinion as to why that evidence showed that Benson was required to file income tax returns for the years 1981. During his testimony, the agent gave his opinion that the payments from

underwriters in this Social Security Administration in 1980 and 1981 were gross income. The defendant at trial had claimed that he had never received the funds for investigative services but rather they were the result of a settlement against the insurance company. The agent also opined that the defendant was not entitled to receive social security disability benefits. The court reversed the convictions of the defendant stating that:

> Much of Cantzler's testimony consisted of nothing more than drawing inferences from the evidence that he was no more qualified than the jury to draw ... The ultimate question concerning social security benefits was whether Benson received those benefits knowing he was not entitled to them...

941 F.2d at 604-605.

In Benson, the court addressed the issue of harmless error as follows:

> The government however, has placed all its bets on the argument that Cantzler's testimony was proper; it

> is not argued that even if it was error to admit that testimony, the error was harmless ... Despite the District Court's opinion that the error was harmless, ... we are not prepared to say from an unguided search of the lengthy trial record that admitting Cantzler's testimony was harmless ... It may be that Cantzler's status as an expert boasted the credibility of those witnesses enough to make a difference to the trial's outcome.

941 F.2d at 605.

In United States v. Dicker, 853 F.2d 1103 (3d Cir. 1988), the defendant's conviction for conspiring to export defense articles in violation of 22 U.S.C. §2778(b)(2) was reversed. The court held that allowing an undercover customs agent to testify under the "lay opinion" rule to the illicit meaning he ascribed to the defendant's potentially legitimate offer to pay agent $50,000.00 for obtaining export certificates on an expedited basis constituted reversible error. The court stated that the agent "simply ascribed his own illicit meaning

to straightforward, potentiality legitimate statements. This admission was surely prejudicial and not helpful to clear understanding of the testimony." 853 F.2d at 110.

In Strong v. E.I. DuPont de Nemours Co., Inc., 657 F.2d 682 (2d Cir. 1981), a products liability action was brought on behalf of decedent Carl Strong by his administratrix, Bessie. At the close of evidence a directed verdict entered for the manufacturer. On appeal the Court of Appeals held that the trial Court did not abuse its discretion in refusing to permit an expert to testify that in his opinion various communications between manufacturers of plastic pipe and connecting device to natural gas company did not provide adequate warnings and instructions. F.2d 685-686. In upholding exclusion of the testimony, the Court stated as follows:

> "... in addition to these considerations, we note that the question of whether the lack of warnings rendered DuPont and McMurray products unreasonably dangerous is not the kind of issue on which expert assistance is essential for the trier of fact. The jury was capable of drawing its own inferences from the available evidence.

667 F.2d at 686.

The above cases demonstrate that not all opinion testimony is per se admissible. When applied to the case at bar, it is clear that the opinions offered by the FBI agents fall with the proscription of these cases. Here the agent informed the jury that the petitioner's receipt of money was corrupt and in violation of 18 U.S.C. §666. In addition, the jury was told by a second agent that the filing of an amended tax return was not a defense to a violation of 28 U.S.C. §7206(1). This testimony was damning to the petitioner and should have been

excluded as per the above cases.

Further support for the petitioner's position can be found in this Court. United States v. Johnson, 63 S.Ct. 1233, 319 U.S. 503, 87 L.Ed. 1546, rehearing denied 64 S.Ct. 25, 320 U.S. 808, 88 L.Ed. 488 (1943). In Johnson, the expert testimony of an IRS agent was found not to be prejudicial, but this Court stated as follows:

> ... so long as proper guidance by a trial court leaves the jury free to exercise its untrammeled judgment upon the worth and weight of testimony, and nothing is done to impair its freedom to bring in its verdict and not someone else's, we ought not to be too finicky or fearful in allowing some discretion to trial judges in the conduct of a trial and an appropriate submission of evidence within the framework of familiar exclusionary rules.

319 U.S. at 519-520.

In a second tax evasion case, Friedberg v. U.S., 75 S.Ct. 138, 348 U.S. 142, 99 L.Ed. 188, rehearing denied 75 S.Ct. 334, 348 U.S. 932, 99 L.Ed.

731, (1954) the Court held that the testimony of a government witness, on cross-examination, that he had not included any cash on hand including petitioner's net worth, because he found no evidence that the petitioner had any cash on hand, was not a mere conclusion which invaded the province of the jury. However, the court stated as follows:

> This was hardly a "conclusion of the witness," which is "an ultimate issue to be decided by a jury" as petitioner claimed. The agent, on petitioner's insistence, was testifying to a negative fact: he had not included cash because he found no evidence of cash. The evidence which he then summarized on redirect was only that which had already been introduced at the trial. It is difficult to see how he invaded the province of the jury; nor do we see how petitioner's question could have been answered otherwise.

U.S. 348 at 145.

What can be extrapolated from these two cases is that this Court does not sanction expert opinion testimony

invading the province of the jury. In the instant case, it is clear that the opinion testimony of the agents contained their opinion of the petitioner's guilt. As noted by the Advisory Committee to the Federal Rules of Evidence:

> Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in manner of the oath-helpers of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria. Thus the question, "Did T have capacity to make a will?" would be excluded, while the question, "Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?" would be allowed.

Fed.R.Evid. 704 advisory committee's note (Emphasis added)

The advisory committee's comments were illustrated poignantly in the case

of Marx & Co. v. Diners' Club, Inc., 550 F.2d 505 (2d Cir.), cert. denied, 434 U.S. 861, 98 S.Ct. 188, 54 L.Ed. 2d 134 (1977). In Marx, the plaintiffs alleged that the defendant committed securities fraud and breached a contractual obligation to register stock received by plaintiffs in exchange for their shares. The expert witness was permitted to give his opinion as to the legal obligations of the parties under the contract for registration of stock. The Court of Appeals held, inter alia, that the trial Court erred in permitting an expert witness to give his opinion. The Court stated as follows:

> The basis of expert capacity, according to Wigmore (§555), may "be summed up in the term 'experience.'" But experience is hardly a qualification for construing a document for its legal effect when there is a knowledgeable gentleman in a robe whose exclusive province it is to instruct the jury on the law. The danger is that the jury may think that the "expert" in the

> particular branch of the law knows more than the judge - surely an inadmissible inference in our system of law.

Marx, 550 F.2d at 512.

The petitioner respectfully asserts that the testimony of the agents in the case at bar crossed an impermissible line where his right to a fair trial was gravely prejudiced.

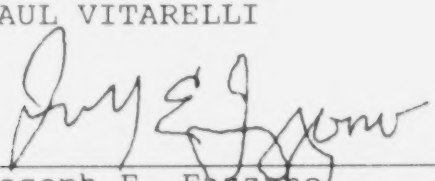
In affirming Mr. Vitarelli's convictions, the United States Court of Appeals for the Second Circuit ignored the arguments submitted herein and failed to address applicable case law in its' own jurisdiction, case law from other circuits and of this Court. In so doing, the Court radically departed from the accepted and usual course of judicial proceedings in violation of Rule 10(a) of the Supreme Court Rules.

CONCLUSION

Based upon the foregoing, the petitioner, Paul R. Vitarelli pleads for the mercy of this Court to correct the injustice that has occurred and to grant certiorari to review the merits of his claim.

Respectfully submitted,

THE PETITIONER,
PAUL VITARELLI



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APPENDIX

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APPENDIX B

Ruling By United States Court
Of Appeals On Petition For
Rehearing (July 29, 1993).....22a-24a

APPENDIX C

Notice Of Motion For Adoption
Of Petition For Rehearing,
Filed July 30, 1993.....25a-28a

APPENDIX A

UNITED STATES of America, Appellee,

v.

Jeffrey P. SANTOPIETRO, Thomas E. Porzio, Defendants,

Paul R. Vitarelli, Joseph J. Santopietro, Robert A. Giacomi, Fred L. Giusti, Jack R. Giacomi, and Perry A. Pisciotti, Defendants-Appellants.

Nos. 1333, 1489, 1334, 1326, 2335 and 1490,
Dockets 92-1334, 92-1349, 92-1356
92-1357, 92-1380 and 92-1381

United States Court of Appeals,
Second Circuit

Argued April 19, 1993.

Decided June 9, 1993.

Former city political leaders were convicted of bribery conspiracies and other offenses following jury trial by the United States District Court for the District of Connecticut, T.F. Gilroy Daly, J. Appeal was taken. The Court of Appeals, George C. Pratt, Circuit Judge, held that: (1) special skills enhancement in bribery guideline did not

apply merely because of defendant's status as a certified public accountant, and (2) bribery guideline applied to defendant convicted of receiving corrupt payments.

Convictions affirmed and sentences affirmed in part, vacated in part, and remanded.

1. Criminal Law - 1254

Special skills adjustment did not apply when sentencing former majority leader of city board of aldermen convicted of bribery and other offenses, even through defendant was certified public accountant, where defendant's offense was not determined under bribery guideline. U.S.S.G. §§ 1B1.7, 2C1.1, 2C1.1, comment (n.3), 2B1.3, 18 U.S.C.A.App.

2. Criminal Law - 1237

Sentencing former majority leader of city board of aldermen, convicted of receiving corrupt payments under bribery sentencing guideline was not clearly erroneous in light of evidence that defendant had corrupt intent; conduct was more akin to bribe-receiving than to gift-receiving. 18 U.S.C.A. §§ 666, 666(a)(2); U.S.S.G. §§ 2C1.1, 2c1.2, 18 U.S.C.A.App.

Judd Burstein, New York City (Gerald L. Shargel, New York City, of Counsel), for defendants-appellants Pisciotti & Santopietro.

Patrick Tomasiewicz, West Hartford, CT (Fazzano & Tomasiewicz, of Counsel), for defendant-appellant, Vitarelli.

David A. Moraghan, Torrington, CT, for defendant-appellant, Jack R. Giacomi.

Richard S. Cramer, Wethersfield, CT,

for defendant-appellant, Robert A. Giacomi.

Jules Sach, New York City, for defendant-appellant, Giusti.

Holly B. Fitzsimmons, Asst. U.S. Atty., D.Conn. (Albert S. Dabrowski, U.S. Atty., Amy B. Lederer, Asst. U.S. Atty., of Counsel), for appellee.

Before: PRATT and JACOBS, Circuit Judges, and WHITMAN KNAPP, Senior District Judge for the United States District Court for the Southern District of New York, sitting by designation.

GEORGE C. PRATT, Circuit Judge:

FACTS AND BACKGROUND

Joseph J. Santopietro became the may of Waterbury, Connecticut, in November 1985. His victory was due in part to a feud between factions of the city's Democratic party, which had been in power for the previous ten years. The

Republicans' uncertainty that they would be able to retain the power they had won fueled a "get it while we can" mentality among Santopietro and his close associates. Perry Pisciotti, former GOP town chairman who was close to Santopietro's family, arranged for Santopietro to use his political position to influence decisions by various city agencies in return for bank loans and cash payoffs from certain local businessmen. Santopietro was reelected twice, and the conspiracy expanded in 1988 to include other Waterbury politicians.

Benefits to certain bankers and land developers included zoning changes, subdivision approvals, confidential appraisal information for use in bidding on city-owned property, expedited treatment from city agencies, and input into appointments. In - return,

Santopietro and other members of his administration received hundreds of thousands of dollars disguised as loans, sales of options, real estate contract cancellations, and property leases.

Following a five-week trial before T.F. Gilroy Daly, Judge, in the United States District Court for the District of Connecticut, a jury found seven defendants guilty of conspiracy, bribery, and various counts of bank fraud, embezzlement, and tax evasion. Six of them have appealed.

Santopietro was convicted of bribery conspiracies, see 18 U.S.C. § 371; receiving corrupt payments, see 18 U.S.C. § 666(a)(1)(B); bank fraud, see 18 U.S.C. § 1344; embezzlement of federal grant monies, see 18 U.S.C. 665(a); and tax evasion, see 26 U.S.C. § 7201. He was sentences to 108 months' imprisonment, three years' supervised

release, a $25,000 fine and a $900 special assessment.

Pisciotti was convicted of conspiracy, see 18 U.S.C. § 371; bribery, see 18 U.S.C. § 666(a)(2); and bank fraud, see 18 U.S.S. § 1344. He was sentenced to 114 months' imprisonment, three years' supervised release, a $25,000 fine, and a $250 special assessment.

Paul Vitarelli, former president of Waterbury's Board of Aldermen, was convicted of conspiracy, see 18 U.S.C. § 371; receiving corrupt payments, see 18 U.S.C. § 666(a)(1)(B); and filing a false statement on his tax return, see 26 U.S.C. § 7206(1). He was sentenced to forty-one months' imprisonment, three years' supervised release and a $150 special assessment.

Robert Giacomi, former majority leader of Waterbury's Board of Aldermen,

was convicted of conspiracy, see 18 U.S.C. § 371; receiving corrupt payments, see 18 U.S.C. § 666(a)(1)(B); and filing a false statement on his tax return; see 26 U.S.C. § 7206(1). He was sentenced to fifty-one months' imprisonment, three years' supervised release, a $7500 fine, and a $150 special assessment.

Jack Giacomi, Waterbury's labor negotiations and brother of Robert Giacomi, was convicted of conspiracy, see 18 U.S.C. § 371; receiving corrupt payments, see 18 U.S.C. § 666(a)(1)(B); and filing a false statement on his tax return, see 26 U.S.C. § 7206(1). He was sentenced to eighteen months' imprisonment, three years' supervised release, a $4000 fine, and a $150 special assessment.

Fred Giusti, former majority leader of Waterbury's Board of Aldermen, was

convicted of conspiracy, see 18 U.S.C. § 371; and receiving corrupt payments, see 18 U.S.C. § 666 (a)(1)(B). He was sentenced to thirty-three months' imprisonment, three years' supervised release, and a $100 special assessment.

The defendants raise numerous issues on appeal, challenging various aspects of their trial and sentences. We have carefully considered all of the challenges to their convictions and concluded that non of them has any merit. We would affirm all of the judgments by summary order but for the existence of two sentencing issues that deserve brief comment: first, the imposition of a special skills enhancement to Robert Giacomi's sentence pursuant to U.S.S.G. § 3B1.3; second, the sentencing of Fred Giusti, who claims he received a "reward" rather than a "bribe", pursuant to U.S.S.G. §

2C1.1. For the reasons set forth below, we affirm all of the judgments except that with respect to Robert Giacomi we affirm the conviction but remand for resentencing.

DISCUSSION

A. Application of a Special Skills Enhancement to Robert Giacomi

[1] Robert Giacomi is a certified public accountant. The probation department's presentence report did not recommend any adjustments that would reflect this fact. The government, however, objected to this omission and argued that Robert Giacomi had used his special accounting skills to prepare false tax returns for himself, Santopietro, and Jack Giacomi. The government urged the court to impose a two-level adjustment under § 3B1.3. "Abuse of Position of Trust or Use of

Special Skill," which it did, increasing Giacomi's offense level from 20 to 22.

The § 3B1.3 enhancement was applied to Giacomi's sentence for the substantive bribery conviction, not to his sentence for filing a false tax return. His sentence for the bribery conviction was determined under § 2C1.1- "Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right," Application note 3 to § 2C1.1 provides "Do not apply § 3B1.3 *** except where the offense level is determined under § 2C1.1(c)(1), (2), or (3). In such cases, an adjustment from § 3B1.3 *** may apply."

Application note 3 is part of the commentary that explains and interprets how the guideline is to be applied and, as such, is binding on the courts. Stinson v. United States, ____ U.S. ___, 112 S.Ct. 1913, 123 L.Ed.2d 598 (1993)

(commentary that interprets or explains guideline is authoratative); see also U.S.S.G. § 1B1.7 ("Failure to follow such commentary could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal."). Since the application note expressly prohibits the imposition of § 3B1.3 enhancement to a sentence under § 2C1.1 unless the offense level is determined under any of the exceptions, the sentencing court erred in applying the § 3B1.3 enhancement. Therefore, we must vacate the sentence and remand for resentencing.

We note in passing that in pronouncing Robert Giacomi's sentence orally, Judge Daly mentioned only one sentence, without differentiating between the three counts of conviction. This practice is consistent with the sentencing guidelines, which direct the

court to determine and adjusted combined offense level applicable to all counts and impose one sentence as the total punishment. See U.S.S.G. § 3D1.1 ("Procedure for Determining Offense Level on Multiple Counts"); U.S.S.G. § 3D1.5 ("Determining the Total Punishment"); U.S.S.G. § 5G1.2 ("Sentencing on Multiple Counts of Conviction"). However, where the maximum allowable sentence on one of the component counts is less than the guideline sentence imposed, the statutory maximum is the guideline sentence for that count of conviction. U.S.S.G. § 5G1.2(b) (incorporating by reference § 5G1.1(a). Following these directions, Judge Daly, in preparing the written judgment and commitment order for Giacomi, indicated fifty-one months, the result of his guideline calculation, as the sentence on counts one and two,

and thirty-six months, the statutory maximum, for Giacomi's third count of conviction, filing a false tax return. See 26 U.S.C. § 7206(1). While it would have been better, given the effect of a statutory maximum on one of the counts, to refer specifically to each count at the sentencing hearing, we would not require a resentencing hearing merely because the court failed to do so. In this case, however, since we are already remanding for resentencing because of the application of the § 3B1.3 enhancement, Judge Daly can avoid any further problems by specifying at the resentencing proceeding the specific jail term being imposed on each count.

B. Failure to Differentiate Between a Bribe and a Reward.

[2] Fred Giusti argues that there is a "hole" in the sentencing guidelines because he was convicted of receiving a

"reward" under 18 U.S.C. § 666(a)(1)(B), but the applicable guideline, U.S.S.G. § 2C1.1, covers only "bribes". He claims that the trial court erred by failing to determine whether he received a bribe or a reward and sentence him accordingly. In response, the government argues that Giusti's characterization of the payments to him as "rewards" is incorrect, that any corrupt payment received in violation of 18 U.S.C. § 666 is a "bribe", and that the applicable guideline for § 666 offenses was correctly determined by the district court to be § 2C1.1.

Giusti argues that he was convicted for receiving a reward for past actions, not for receiving a bribe. While 18 U.S.C. § 666 is entitled "Theft of bribery concerning programs receiving Federal Funds", the statute itself criminalizes "corruptly *** accept[ing]

*** anything of value *** intending to be influenced or rewarded *** in connection with any *** transaction" of a local government official. 18 U.S.C. § 666(a)(1)(B). The indictment and the jury charge both tracked the language of the statute, including the language "intending to be influenced or rewarded", without differentiating between being "influenced" and being "rewarded". Giusti does not dispute the validity of the indictment or of the jury charge.

For all practical purposes, the differences between influencing and rewarding official action is one of timing. To influence, the payment is made before the official action; to reward, the payment is made afterwards. The evidence at trial revealed that Giusti was a member of Waterbury's Board of Aldermen from January 1, 1986, to

February 9, 1989, and that he received corrupt payments from July 5, 1988, to October 5, 1988. Since the time during which he received corrupt payments fell within his term in office, it is not clear that he received the payments only as a reward for past actions. Indeed, on this record a factfinder could reasonable infer that the payments were bribes, or rewards,or both. Therefore, on a factual level the evidence does not compel Giusti's assertion that he was the recipient of rewards rather than bribes.

Even if the payments Giusti received were in fact rewards made for past actions rather than bribes to influence future actions, he was correctly sentenced under § 2C1.1, entitled "Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right". Giusti argues that §

2C1.1 covers only bribes, because it does not refer to rewards or gratuities and that § 2C1.2, entitled "Offering, Giving, Soliciting, or Receiving a Gratuity", should apply to him. The statutory index of the sentencing guidelines, which specifies which guideline applies to which crime, lists both §2C1.1 and §2C1.2 as applicable guidelines for 18 U.S.C. § 666(a)(1)(B) offenses. However, guideline § 2C1.2, which covers gratuities, does ·ot include a corrupt purpose as an element of the offense. See U.S.S.G. § 2C1.2, comment.(background). Since a corrupt purpose was an essential element of Giusti's conviction under 18 U.S.C. § 666,cf. United States v. Crozier, 987 F2d 893 (2d Cir.1993) (rejecting claim that former § 666(c) was bribery-only statute; court's failure to distinguish between bribe and gratuity

inconsequential since it clearly instructed jury on mens rea), sentencing pursuant to § 2C1.2 would be inappropriate, leaving § 2C1.1 as the only applicable guideline.

Section 2C1.1's failure to refer to "rewards" does not mean that there is a "hole" in the guidelines. Not every criminal statute has a guideline that mirrors its language; the statutory index simply "specified the guidelines section *** ordinarily applicable to the statute of conviction." U.S.S.G.APP.A,intro. The first circuit recently confronted a similar issue in United States v. Mariano, 983 F.2d 1150, 1158-60 (1st Cir.1993). There, the defendants claimed that they had given a gratuity, rather than a bribe, to a municipal official in violation of 18 U.S.C. §666(a)(2), and should be sentenced under the gratuity guideline,

§ 2C1.2. The district court rejected their argument and sentenced them under the bribery guideline, § 2C1.1. The first circuit upheld the district court's choice of guideline, because the offenses to which the defendants pled guilty "involved corrupt intent"; therefore, "the determination that their actions were more akin to bribe-giving than to gift-giving was not clearly erroneous". Mariano, 983 F.2d at 1159.

Giusti argues not that he was improperly convicted under 18 U.S.C. § 666, only that he was improperly sentenced. Because the jury's verdict establishes that Giusti had a corrupt intent, his actions are more akin to bribe receiving than to gift -receiving. As we view it, the crucial factor in this case is the corrupt purpose, not the timing of the payment. Therefore, sentencing Giusti under the bribery

guideline was not clearly erroneous.

CONCLUSION

Because the district court improperly applied a two-level enhancement under § 3B1.3 to Robert Giacomi, we vacate his sentence and remand for resentencing; his conviction, however, is affirmed. The judgments against Santopietro, Pisciotti, Vitarelli, Jack Giacomi, and Giusti are affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

[SEAL]

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29th day of July, one thousand nine hundred and ninety-three.

DOCKET NUMBERS 92-1334(L)

and 92-1349, 1381

UNITED STATES OF AMERICA,

Appellee,

-v.-

JEFFREY P. SANTOPIETRO, THOMAS E. PORZIO,

Defendants,

PAUL R. VITARELLI, JOSEPH J. SANTOPIETRO, ROBERT A. GIACOMI, FRED L. GIUSTI and JACK R. GIACOMI, and PERRY A PISCOTTI,

Defendants-Appellants

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by

Appellants Joseph Santopietro and

Perry Piscotti,

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT,

ELAINE B. GOLDSMITH, CLERK

By:

/s/

Carolyn Clark Campbell

Chief Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

v. [SEAL]

PAUL R. VITARELLI and JACK R. GIACOMI

Docket Number 92-1334(L) and 92-1380

NOTICE OF MOTION

for Adoption of Petition for Rehearing

MOTION BY:

Patrick Tomasiewicz, Esq.

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433 South Main Street, Suite 215

West Hartford, CT 06110

(203) 561-1947

OPPOSING COUNSEL:

Amy B. Lederer

Assistant United States Attorney

450 Main Street

Hartford, CT 06103

Has consent of opposing counsel:

A. been sought? - Yes

B. been obtained? - No

Has service been effected? - Yes

Is oral argument desired? - Yes

(Substantive motions only)

Requested return date:

(See Second Circuit Rule 27(b)

Has argument date of appeal been set: N/A

A. by scheduling order?

B. by firm date of argument notice?

C. If Yes, enter date:_____

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below?

(See F.R.A.P. Rule 8) - N/A

Would expedited appeal eliminate need for this motion? - N/A

If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard?

Judge or agency whose order is being appealed: Honorable T.F. Gilroy Daly, United States District Judge

Brief statement of the relief requested: The defendants Paul R. Vitarelli and Jack R. Giacomi request permission to adopt defendants' Petition for Rehearing filed by defendants Santopietro and Piscotti.

By: (Signature of attorney)

/s/

Signed name must be printed beneath

Patrick Tomasiewicz

Appearing for: (Name of party)

Paul R. Vitarelli

Jack R. Giacomi

Appellate or Petitioner:

[ ] Plaintiff [x] Defendant

Appellee or Respondent:

[ ] Plaintiff [ ] Defendant

Date: July 16, 1993

ORDER

IT IS HEREBY ORDERED that the motion be and it is hereby GRANTED.

[SEAL]

/s/

Pratt, J.

July 30, 1993

Date

Circuit Judge

Supreme Court, U.S.
FILED
DEC 29 1993
OFFICE OF THE CLERK

Nos. 93-671 and 93-681

In the Supreme Court of the United States

OCTOBER TERM, 1993

JOSEPH J. SANTOPIETRO AND PERRY A. PISCIOTTI,
PETITIONERS

v.

UNITED STATES OF AMERICA

PAUL R. VITARELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the district court was authorized to depart upward, pursuant to Sentencing Guidelines § 2C1.1, Application Note 5, from the Guidelines sentence for petitioners Santopietro and Pisciotti based on the fact that their offenses involved a "systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government."

2. Whether the district court correctly enhanced the sentences of petitioners Santopietro and Pisciotti for obstruction of justice pursuant to Sentencing Guidelines § 3C1.1.

3. Whether petitioner Pisciotti was denied his Sixth Amendment right to effective assistance of counsel because the attorney who represented him during the government's investigation and through the first four days of trial had a conflict of interest.

4. Whether law enforcement agents who testified at petitioners' trial improperly commented on petitioners' guilt and invaded the province of the jury.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-671

JOSEPH J. SANTOPIETRO AND PERRY A. PISCIOTTI, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 93-681

PAUL R. VITARELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (93-671 Pet. App. 1a-10a) is reported at 996 F.2d 17.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 1993. A petition for rehearing was denied on July 29, 1993. 93-671 Pet. App. 11a-12a. The petition for a writ of certiorari in No. 93-671 was filed on October 26, 1993. The petition for a writ of certiorari in No. 93-681 was filed on October 29, 1993, and thus is out of time under this Court's Rule 13. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Connecticut, the three petitioners were convicted of conspiring to commit bribery, in violation of 18 U.S.C. 371. Petitioner Santopietro also was convicted on five counts of receiving corrupt payments, in violation of 18 U.S.C. 666(a)(1)(B); two counts of bank fraud, in violation of 18 U.S.C. 1344; six counts of embezzlement of federal grant funds, in violation of 18 U.S.C. 665(a); and two counts of tax evasion, in violation of 26 U.S.C. 7201. Petitioner Pisciotti also was convicted on three counts of giving corrupt payments, in violation of 18 U.S.C. 666(a)(2), and one count of bank fraud, in violation of 18 U.S.C. 1344. Petitioner Vitarelli also was convicted on one count of receiving corrupt payments, in violation of 18 U.S.C. 666(a)(1)(B), and one count of making a false statement on his tax return, in violation of 26 U.S.C. 7206(1). Santopietro was sentenced to 108 months' imprisonment, to be followed by three years' supervised release. Pisciotti was sentenced to 114 months' imprisonment, to be followed by three years' super-

vised release. Vitarelli was sentenced to 41 months' imprisonment, to be followed by three years' supervised release. The court of appeals affirmed. 93-671 Pet. App. 1a-10a.

1. Petitioner Santopietro became mayor of the city of Waterbury, Connecticut, in November 1985, and was twice reelected. Over the next five years, he conspired with petitioner Pisciotti (former Town Chairman and Republican State Central Committee member), petitioner Vitarelli (president of the city's Board of Aldermen), other government officials,[1] and a group of bankers and land developers to trade favorable city action on certain development projects in return for payments disguised as loans, sales of options, contract cancellations, and property leases. 93-671 Pet. App. 3a; Gov't C.A. Br. 2-19. Beginning shortly after Santopietro's 1985 election and continuing until approximately 1990, the conspirators collected at least $710,000 from the group of developers. *Id.* at 2-3. Santopietro also used federal grant funds administered by Waterbury's Department of Employment, Education and Grants Administration for personal travel and entertainment. *Id.* at 19-20.

2. FBI agent Michael Clark was one of approximately 35 witnesses who testified at petitioners' trial, which lasted more than five weeks. Clark was called to identify certain documents, to describe the details of a series of complex financial and real estate transactions using the documents, and to describe the execution of search warrants and interviews of certain witnesses.

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[1] Robert Giacomi (the Board of Aldermen's majority leader), Fred Giusti (an alderman and city employee), and Jack Giacomi (the City Negotiator beginning in 1987) were also convicted on a variety of charges including conspiracy.

On cross-examination, all three petitioners repeatedly questioned Clark about his views on the legality of the transactions he had described during his direct examination. Gov't C.A. Br. 24-29. For example, Pisciotti's counsel asked: "Now, you don't like any of these transactions. That's been your testimony, correct?" Agent Clark answered: "I feel that there's bank fraud, money laundering and corrupt payments in several of these transactions." *Id.* at 27. Santopietro and Pisciotti objected to the answer, and Santopietro moved to strike the answer. The court denied the motion, ruling that counsel had opened the door to Clark's answer; the court suggested that counsel not ask such questions. Feb. 28, 1992, Tr. 145-146. When Santopietro later asked the court to reconsider its ruling on the ground that the agent had given his opinion that crimes had been committed, the court agreed to reconsider the issue and invited suggestions for a cautionary instruction. Santopietro then in effect withdrew his motion to strike, stating that he would prefer the cautionary instruction rather than striking the testimony. *Id.* at 249-252. At the beginning of the next day of trial, the court gave the jury a cautionary instruction before Agent Clark retook the stand. Gov't C.A. Br. 31.

On redirect examination, the prosecutor asked Agent Clark to define the term "money laundering," which Clark had used during cross-examination. 93-681 Pet. 8. Santopietro objected on the ground that the definition was "something that [the court] will instruct the jury on." *Ibid.* The judge overruled the objection, and Clark described money laundering as the use of a "financial transaction" to "disguise either where the money came from or where the money ends

up." *Id.* at 9. No defendant was charged with money laundering.

The prosecutor also asked Agent Clark to define the term "corrupt payments," a term that he had used during cross-examination. There was no objection to that question. 93-671 Pet. 26; 93-681 Pet. 9. Agent Clark described "corrupt payments" as "anything of value" and stated that the term "comes from the statute which is Title 18, U.S. Code 666." 93-671 Pet. 26-27; 93-681 Pet. 9. There was no motion to strike the answer. When the prosecutor posed her next question about whether the statute distinguished between loans and gifts and other payments, defense counsel objected, and the objection was sustained. Mar. 3, 1992, Tr. 12-13.

On recross-examination of Clark, Santopietro exploited the cautionary instruction the court had given about Clark's testimony. Santopietro repeatedly emphasized through his recross-examination that it was up to the jury, not Clark, to decide whether certain crimes had been committed in this case. Mar. 3, 1992, Tr. 21-23.

IRS agent Daniel Mancinone also testified as a government witness at petitioners' trial. The government had Mancinone introduce several documents, including the tax returns of various defendants. During cross-examination, Vitarelli and two co-defendants attempted to introduce into evidence amended tax returns for the year 1988 that had been filed in 1991. Gov't C.A. Br. 35-36. The district court refused to admit the amended returns, but Vitarelli's counsel elicited from Mancinone on cross-examination, over government objection, testimony that the amended returns had been filed and that Vitarelli owed no tax as of the date of trial. *Id.* at 36. On redirect exami-

nation, the district court overruled petitioners' objection and permitted Mancinone to answer the question, "[t]o the best of your knowledge * * * is the filing of an amended tax return a defense to a charge of subscribing to a false tax return?" Mancinone answered in the negative. *Ibid.*; 93-681 Pet. 10-11.

3. At sentencing, after calculating Pisciotti's and Santopietro's base offense levels, the district court added a two-level enhancement based on its finding that the two of them had obstructed justice within the meaning of Sentencing Guidelines § 3C1.1. The court found that Santopietro had obstructed justice during the execution of a search warrant at his office in March 1991. Gov't C.A. Br. 102. When officers arrived to execute the warrant, Santopietro had co-defendant Jack Giacomi smuggle Santopietro's briefcase out of the building. The FBI learned of the action and retrieved the briefcase, which was found to contain documents incriminating Santopietro. *Id.* at 21.

The court found that Pisciotti obstructed justice by attempting to influence his sister's trial testimony. Gov't C.A. Br. 104. In support of that finding, the district court relied on hearsay testimony at the sentencing hearing from Agent Clark. Clark testified that an employee of the U.S. Attorney's office had overheard Pisciotti in the courthouse coffee shop telling his sister to testify that she did not remember or was confused in response to certain questions. June 23, 1992, Tr. 11-12. Because the employee did not wish to be publicly identified, the government gave the employee's name to the court in camera. *Id.* at 12-13. The court found corroboration for Clark's testimony in the grand jury and trial testimony of Pisciotti's sister. *Id.* at 37; Gov't C.A. Br. 105. The

court found the hearsay sufficiently reliable to support an enhancement for obstruction of justice. June 23, 1992, Tr. 37.

4. After the court applied the obstruction of justice enhancements to Santopietro and Pisciotti, it determined the adjusted offense levels and the Guidelines sentencing range. The court then departed upward from the Guidelines range for Santopietro and Pisciotti pursuant to Sentencing Guidelines § 2C1.1, Application Note 5, and Guidelines § 5K2.7. Section 2C1.1 provides the offense level for bribery offenses. Application Note 5 to Section 2C1.1 provides:

> Where the court finds that the defendant's conduct was part of a systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).

The referenced Chapter Five, Part K of the Sentencing Guidelines consists of several policy statements that discuss grounds for departures from Guidelines sentences. In particular, Section 5K2.7 pertains to upward departures where government functions have been disrupted. It provides:

> If the defendant's conduct resulted in a significant disruption of a governmental function, the court may increase the sentence above the authorized guideline range to reflect the nature and extent of the disruption and the importance of the governmental function affected. Departure from the guidelines ordinarily would not be justified when the offense of conviction is an offense such as bribery or obstruction of justice; in such cases interference with a governmental function

> is inherent in the offense, and unless the circumstances are unusual the guidelines will reflect the appropriate punishment for such interference.

In regard to Santopietro, the district court concluded that his "extensive criminal conduct as found by the jury involving embezzlement, bank fraud and tax evasion in addition to bribery, resulted in * * * 'pervasive corruption of a governmental function, process and office' cited in Application Note 5." Gov't C.A. Br. 89. The court found that Santopietro "sent the message that for the right price [his] office was for sale, and it was for sale early on. All with an arrogance, at least as the evidence came forward, * * * that made a mockery of the faith that the electorate had placed in you, and placed in you more than one time." *Id.* at 95. The court also specifically found that "[t]he city's confidence in elected officials and any notion of sanctity in a vote cast, has been for all practical purposes shattered." *Ibid.*

In regard to Pisciotti, the court explained that

> [t]he conspiracy we heard about over five weeks of trial was not about a single act of indiscretion. It was about an overwhelming scheme to take advantage at every turn of the collusional [*sic*] * * * of Joseph Santopietro's and Richard Barbieri's obsessions with power in their respected areas. Even before the mayor had taken his oath of office, as I understand the facts, you and Mr. Barbieri were meeting or had a meeting to lay the ground work for the conspiracy charged in the indictment. Your role then as an elder statesman, Mr. Pisciotti, was in the final analysis a corrupting one rather than an enlightening one.

> The net affect [*sic*] of these plans was, as I have said, the very systematic and pervasive corruption of a governmental function, process or office contemplated in Application Note 5. Corruption that surely caused a los[s] of public confidence in government.

Gov't C.A. Br. 95-96.

5. The court of appeals affirmed. 93-671 Pet. App. 1a-10a. In its published opinion, the court addressed certain sentencing arguments raised by petitioners' co-defendants. The court summarily affirmed the judgments against petitioners, stating that it had "carefully considered" their "numerous issues on appeal" and "concluded that none of them has any merit." *Id.* at 5a.

ARGUMENT

1. Santopietro and Pisciotti contend (93-671 Pet. 10-16) that the district court erred when it departed upward from the Guidelines sentencing range pursuant to Sentencing Guidelines § 2C1.1, Application Note 5, and Guidelines § 5K2.7. Petitioners argue that the district court's reliance on Section 2C1.1, Application Note 5, runs afoul of Section 5K2.7. An upward departure under Section 2C1.1, Application Note 5, however, is not precluded by Section 5K2.7, and the departure in this case was not inconsistent with the policy articulated in Section 5K2.7.

Section 5K2.7 authorizes an upward departure in cases in which a governmental function is significantly disrupted. It specifies that such a departure is generally not appropriate, however, where such disruption is inherent in the offense, *i.e.*, in cases involving offenses such as bribery or obstruction of

justice. It nonetheless authorizes an upward departure even in those cases, if the court finds "unusual" circumstances. See, *e.g.*, *United States* v. *Sarault*, 975 F.2d 17, 19 (1st Cir. 1992) (departure appropriate under Section 5K2.7 even when disruption of governmental function is inherent in the offense if "disruption was so atypically great as to exceed the level of interference inherent in the offense"); *United States* v. *Garcia*, 900 F.2d 45, 49 (5th Cir. 1990) (departure appropriate under Section 5K2.7 even when disruption of government function is inherent in the offense if "unusual circumstances" exist).

Section 2C1.1, Application Note 5, authorizes an upward departure where the defendant's conduct was part of a pattern of "systematic or pervasive corruption," where it involved corruption of a governmental "function, process, or office," and where the corruption is such that it "may cause loss of public confidence in government."

Petitioners' case was one in which the evidence showed more than mere disruption of a governmental function. The corruption that was proved at trial permeated the Waterbury government, involved the Mayor's office and the Board of Aldermen, and affected numerous municipal decisions and transactions. Moreover, the district court found that this case "surely caused a los[s] of public confidence in government," Gov't C.A. Br. 96, and that "[t]he city's confidence in elected officials and any notion of sanctity in a vote cast, has been for all practical purposes shattered." *Id.* at 95. The upward departure in this unusual case was thus warranted by Section 2C1.1,

Application Note 5, and did not contravene Section 5K2.7.[2]

2. Santopietro and Pisciotti also challenge (93-671 Pet. 16-20) the district court's application of an enhancement to their offense levels under Sentencing Guidelines § 3C1.1, based on obstruction of justice.

Section 3C1.1 directs a sentencing court to increase a defendant's offense level by two levels if the defendant "willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense." Application Note 3 to Section 3C1.1 provides a non-exhaustive list of the types of conduct that fall within that Guideline: it includes "unlawfully influencing" a witness, "suborning, or attempting to suborn perjury," and "destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding." Application Note 3(d) explains that "if such conduct occurred contemporaneously with arrest (*e.g.*, attempting to swallow or throw away a controlled substance), it shall not, standing alone, be sufficient to warrant an adjustment for obstruction unless it resulted in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender."

The district court correctly applied the Section 3C1.1 enhancement to Santopietro based on Santo-

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[2] Santopietro and Pisciotti also contend (93-671 Pet. 15-16) that the district court failed to explain the extent of its departure. The extent of the upward departure, however, is amply supported by the court's discussion of the magnitude of the offense.

pietro's conduct in arranging for his briefcase to be smuggled out of his office when the FBI agents were executing a warrant to search that office in March 1991. There is no merit to Santopietro's contention (93-671 Pet. 17-19) that he falls within the exception in Application Note 3(d) for conduct that occurs contemporaneously with arrest, because, as he concedes (*id.* at 17), he was not arrested in March 1991 when he had the briefcase smuggled out. Moreover, as the Eighth Circuit recently held, the exception in Application Note 3(d) includes "only conduct admitting a spontaneous or visceral or reflexive response occurring at the point arrest becomes imminent," and not "cool and deliberate actions" by a defendant. *United States* v. *Lamere*, 980 F.2d 506, 515 n.6 (8th Cir. 1992); see also *United States* v. *Stout*, 936 F.2d 433, 435 (9th Cir. 1991) (attempting to flush counterfeit bill down toilet at police station after arrest for counterfeiting is not an "act of panic"). Santopietro's attempt to conceal the contents of his briefcase from the investigators is not the kind of spontaneous effort to destroy evidence that falls within the exception in Application Note 3(d).

The district court correctly applied the obstruction of justice enhancement to Pisciotti based on its finding that he attempted to influence his sister's testimony during a conversation he had with her in the courthouse coffee shop just prior to her testimony. Pisciotti argues (93-671 Pet. 19-20) that the district court erred because the court relied on hearsay evidence to make that finding and because the government did not disclose the identity of the hearsay declarant.

The Guidelines explicitly provide that "[r]eliable hearsay may be considered" in sentencing a defendant. Sentencing Guidelines § 6A1.3, Commentary; see *United States* v. *Ushery*, 968 F.2d 575, 583 (6th Cir.), cert. denied, 113 S. Ct. 392 (1992); *United States* v. *Montoya*, 967 F.2d 1, 2-3 (1st Cir.), cert. denied, 113 S. Ct. 507 (1992); *United States* v. *Griffin*, 945 F.2d 378, 381 (11th Cir. 1991), cert. denied, 112 S. Ct. 1958 (1992). Moreover, the Guidelines authorize nondisclosure of the identity of an informant who provided hearsay evidence if there is "good cause for the nondisclosure" and "there is sufficient corroboration by other means." Sentencing Guidelines § 6A1.3, Commentary.

The district court correctly found that the information provided by Agent Clark at Pisciotti's sentencing proceeding was reliable. There is nothing in the record to suggest that the government employee who relayed the information to Clark had any connection to the case or had any reason to fabricate the information. Pisciotti's case is not one in which the informant was wholly anonymous. The identity of the informant was disclosed to the court and significant descriptive information was disclosed to Pisciotti. Pisciotti was provided not only with facts about the informant's employment that made independent identification likely, but also with facts regarding the interaction between the informant and Pisciotti's sister indicating that the sister could identify the informant. See June 23, 1992, Tr. 12. Moreover, there was sufficient corroboration for the hearsay testimony through other means, including the trial and grand jury testimony of the sister. Accordingly, the district court did not err in finding that Pisciotti attempted

to influence his sister's testimony and in enhancing his sentence under Section 3C1.1 based on that finding.

3. Pisciotti argues (93-671 Pet. 20-25) that he was denied his Sixth Amendment right to effective assistance of counsel because the attorney who represented him during the government's investigation and the first four days of trial had a conflict of interest.

Throughout the government's investigation and the first four days of trial, Pisciotti was represented by attorney Paul Yamin. Prior to trial, Yamin had accompanied Pisciotti's sister when she appeared before the grand jury where she was asked to testify regarding one of the transactions later charged in the indictment. She read a statement to the grand jury that had been prepared by Yamin. Gov't C.A. Br. 59-61. That grand jury testimony and the relationship between Pisciotti, his sister, and Yamin were alluded to during Pisciotti's sentencing.

During argument about the obstruction of justice enhancement, the prosecutor stated that she believed Pisciotti's attempt to influence his sister's testimony actually had begun "between the time that she spoke to the agents at her home and the time when she appeared at the Grand Jury with Mr. Pisciotti's lawyer and a statement that Mr. Pisciotti's lawyer had written for her to tell her what the version of the events was." 93-671 Pet. 21. The prosecutor also stated that prior to acquiring evidence of Pisciotti's involvement, "it would not have been fair to tax Mr. Pisciotti himself with what we believed at the time of the Grand Jury was primarily the actions of his lawyer." *Id.* at 22. Pisciotti interprets that statement to mean that "at the time of trial, the government believed that Yamin had been involved in obstructing

justice with respect to the very allegations against which he was defending Pisciotti," 93-671 Pet. 22, and he asserts that Yamin was therefore laboring under a conflict of interest in representing him.

Regardless of the substance of Pisciotti's ineffective assistance claim, it is not ripe for review at this juncture. Claims of ineffective assistance of counsel ordinarily should be raised in the first instance in a motion under 28 U.S.C. 2255 rather than on direct appeal. See, *e.g.*, *United States* v. *Navejar*, 963 F.2d 732, 735 (5th Cir. 1992); *United States* v. *McGill*, 952 F.2d 16, 19 (1st Cir. 1991). Ineffective assistance of counsel claims are ordinarily ill-suited to resolution on direct appeal, because they typically require consideration of matters that are outside the direct appeal record. Pisciotti did not raise his ineffectiveness claim in the district court, and the district court thus did not have an opportunity to develop a record on the issue. Accordingly, Pisciotti's claim that his counsel was disabled by a conflict of interest is not properly presented for review at this time.

On the merits, Pisciotti's claim rests solely on the prosecutor's implication at sentencing that "at the time of the Grand Jury," the government believed that Pisciotti's attorney had been attempting to shape the testimony of Pisciotti's sister. 93-671 Pet. 22. Pisciotti did not introduce any evidence of any actual investigation of the attorney by the government or any evidence that the attorney had actually engaged in any misconduct. Nor did Pisciotti allege or establish in the district court any specific prejudice he suffered from the alleged conflict of

interest—proof that would be difficult to muster in any event, inasmuch as the attorney was dismissed after the first four days of trial.

4. Santopietro and Pisciotti contend that the court erred in permitting Agent Clark to testify in statutory language in characterizing their conduct. Specifically, they complain that the district court should not have permitted Agent Clark to testify that the term "corrupt payments" was "shorthand for anything of value" and that the term came from 18 U.S.C. 666. 93-671 Pet. 26-27. They contend that Clark thereby conveyed his conclusion that petitioners had violated 18 U.S.C. 666 and implicitly bolstered the credibility of other government witnesses. They also contend that Clark's testimony about "money laundering" and "corrupt payments" improperly bolstered the government's case. 93-671 Pet. 27-29. Vitarelli makes the related claim that the district court should have excluded opinion testimony by Agents Clark and Mancinone that invaded the province of the jury. 93-681 Pet. 22-32.

Contrary to petitioners' contention (93-671 Pet. 26), Agent Clark's testimony on redirect examination about the meaning of the term "corrupt payments" and his reference to 18 U.S.C. 666 were not objected to, nor did any defendant move to strike his testimony on that subject. Mar. 3, 1992, Tr. 12. The court sustained an objection to the next question the prosecutor posed about the specifics of Section 666, and Agent Clark did not answer it. *Ibid.* In fact, even petitioners' objection to Clark's initial use of the term "corrupt payments" during cross-examination was withdrawn in light of the district

court's cautionary instruction about Clark's testimony.[3]

Because there was no objection, the challenge to the "corrupt payments" testimony is reviewable only for plain error. See Fed. R. Crim. P. 52(b); *United States* v. *Olano*, 113 S. Ct. 1770, 1776 (1993). But the admission of that testimony does not even remotely rise to that level. First, petitioners opened the door to testimony about the legality of their conduct by repeatedly asking Agent Clark for his opinion on the legality of various transactions and his understanding of the applicable law. In fact, Agent Clark's initial use of the term "corrupt payments" was in response to questions on cross-examination. Petitioners therefore cannot complain about the government's request on redirect examination that Agent Clark define the terms he had used on cross-examination. See *United States* v. *Prince*, 883 F.2d 953, 961-962 (11th Cir. 1989); *United States* v. *Vachon*, 869 F.2d 653, 658-659 (1st Cir. 1989); *United States* v. *Nersesian*, 824 F.2d 1294, 1308-1309 (2d Cir.), certs. denied, 484 U.S. 957, 958 (1987) and 484 U.S. 1061 (1988); *United States* v. *Chavis*, 772 F.2d 100, 107 (5th Cir. 1985).[4]

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[3] Petitioner Vitarelli concedes that he is not challenging Clark's initial testimony about "corrupt payments" on cross-examination. 93-681 Pet. 7-8.

[4] Although petitioners refer to Agent Clark's testimony about the meaning of the term "money laundering," to which there was an objection, they could not have been prejudiced by that testimony, because none of them was charged with money laundering. It is also far from clear that petitioners preserved their objection to Agent Clark's definition of money laundering. Santopietro objected to that testimony only on the ground that "[t]his is something that [the court] will

In any event, Agent Clark's testimony that the term "corrupt payments" comes from 18 U.S.C. 666 did not constitute an opinion about petitioners' guilt. And the cautionary instruction that the court gave undermined any potential prejudice by instructing the jurors that "as the finders of the facts you, the jurors, will of course ultimately decide such matters." Gov't C.A. Br. 32. See *United States* v. *Johnson*, 319 U.S. 503, 519-520 (1943) (expert witness testimony about income and expenditures of defendant did not invade province of jury in light of judge's charge, which left "jury free to exercise its untrammeled judgment upon the worth and weight of testimony"). Moreover, after the instruction was given and after Clark's testimony about "corrupt payments" on redirect examination, Santopietro revisited the issue on recross-examination. He emphasized the cautionary instruction about Clark's opinion with respect to certain crimes and the fact that it was up to the jury, not the FBI, to determine whether the defendants were guilty. Mar. 3, 1992, Tr. 21-23.

There is also no merit to Vitarelli's claim that Agent Mancinone improperly invaded the jury's province by testifying that to the best of his knowledge the filing of an amended tax return is not a defense to the offense of subscribing to a false tax return. 93-681 Pet. 10. Mancinone's testimony was in direct response to Vitarelli's cross-examination, in which he elicited testimony that he and some of the other defendants had filed amended tax returns and

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instruct the jury on"; none of the defendants objected on the ground that the agent's testimony amounted to an opinion on the defendants' guilt. 93-681 Pet. 8-9.

that Vitarelli owed no tax as of the date of trial. The cross-examination incorrectly suggested that the filing of the amended returns absolved Vitarelli of any liability for filing falsified tax returns. The government was entitled to bring out testimony to rebut that inference. See *United States* v. *Mang Sun Wong*, 884 F.2d 1537, 1543-1544 (2d Cir. 1989), cert. denied, 493 U.S. 1082 (1990). In addition, the prosecutor's question was posed to the agent in terms of the agent's knowledge and did not offer the agent's testimony as an absolute statement of the law. See *United States* v. *Fogg*, 652 F.2d 551, 556-557 (5th Cir. 1981), cert. denied, 456 U.S. 905 (1982).

More significantly, Agent Mancinone's testimony was consistent with the district court's instruction to the jury that "the mere filing of an amended return will not serve as a defense to this charge [of filing a false return]." Gov't C.A. Br. 37. Vitarelli could not have been prejudiced by testimony from an IRS agent who provided the same information that the jury later learned directly from the district court.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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